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BLAKELY TO BE ARGUED AT HOME AND IN THE NATION'S CAPITAL

• U.S. Supreme Court to Hear *Blakely* Argument on Opening Day

On the first day of its new term, the United States Supreme Court will on October 4 hear argument in two cases each of which raises an extraordinarily important question about crime and punishment in the U.S. *United States v. Booker* and *United States v. Fanfan* are both cases that involve the constitutionality of federal sentencing guidelines. The Court is being asked to decide whether the guidelines are unconstitutional to the extent they allow a judge to enhance a convicted defendant's sentence based on the judge's, and not the jury's, fact findings.

During the last Supreme Court Term, in the case of *Blakely v. Washington,* the Court in a 5-4 decision shook the very foundation of sentencing in criminal cases. In particular, the Court held that the State of Washington's criminal sentencing system was unconstitutional. But, the ramifications of that decision reach far beyond the Washington state lines. In *Blakely,* the Court had to decide what the Sixth Amendment's guarantee of a jury trial really means. According to *Blakely*, the Sixth Amendment requires that juries rather than judges must decide any matter that a defendant did not concede that could lengthen his sentence beyond the maximum set out in the state's sentencing guidelines.

Lower federal courts are split on the question of whether this means that the federal sentencing guidelines, too, are doomed. After October 4 this question will be answered by the High Court.

• Indiana Supreme Court Also to Hear *Blakely* Arguments

The Indiana Supreme Court has set aside two hours for argument on two Indiana cases that the defense argues are impacted by *Blakely v. Washington*. Argument is set on November 10, 2004, at 9:00 a.m. Those cases are *Adolphe Smylie v. State* and *Bruce Heath v. State.* A final decision has not yet been made as to who from the Attorney General's Office will argue the cases.

In one of the State's *Blakely* briefs filed with the Court, Deputy Attorney General Ellen Meilaender argued that "Indiana's sentencing scheme is qualitatively different from the Washington scheme at issue in *Blakely,* and those differences are such as to remove Indiana from the scope of *Blakley's* coverage. Although *Blakely* does state that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings," that statement, when taken in context, does not invalidate sentences above the presumptive sentence in Indiana's sentencing scheme, Meilaender argued.

Under the Washington sentencing scheme, a felony has a "standard range" of possible sentences. *Blakely* said that an "exceptional" sentence, one beyond the standard range, could be imposed only if additional findings are made. *Blakely* did not invalidate a sentence imposed within the standard range, but only those "exceptional" sentences that go beyond the standard range.

In Indiana, the statutory range of sentences possible for any given class of felonies is equivalent to Washington's "standard range" the attorney general is expected to argue. As long as a sentence falls within that range, it is not impacted by *Blakely.* In Meilaender's brief she asserts that "although Indiana has selected a 'presumptive sentence' within that range, the 'presumptive sentence' is best thought of as a guidepost intended to direct a trial court's imposition of the appropriate sentence."

The defense will ask the Supreme Court to find that *Blakely v. Washington* renders Indiana's present sentencing scheme unconstitutional. Judges and prosecutors alike are anxious for guidance from the Supreme Court on the applicability of *Blakely* to sentencing in Indiana.

Brown County , Indiana

Inside this issue:

Indiana

- **Visiting a Common Nuisance**

Zuniga v. State, ___ N.E.2d ___(Ind. Ct. App. 9/27/04) As Ann Zuniga was waiting for her child's father inside the attached garage at the father's home, the Hamilton County Drug Task Force raided the residence pursuant to a search warrant. The raid yielded evidence of illegal drug use: smoke, odor of burnt marijuana, smoking devices, rolling paper, a rolling machine and marijuana residue. Zuniga, among others, was arrested. She was charged and convicted of visiting a common nuisance and sentenced to 180 days probation.

The defendant, on appeal, argued that the State had presented insufficient evidence to support her conviction. Specifically, she argued that the State had failed to prove that (1) she had knowledge of the common nuisance and (2) that the common nuisance (the father's home) had been the location for illegal drug use on at least one prior occasion.

To convict a defendant of visiting a common nuisance the State must prove beyond a reasonable doubt that the defendant knew the building, structure, vehicle or other place she visited was used for the unlawful use of a controlled substance. Testimony in Zuniga's case revealed that upon arrival at the subsequently raided home Zuniga stepped inside the garage. A detective testified that upon his stepping into the home he smelled burnt marijuana with the strongest smell coming from the garage. It was in that garage that smoking devices, rolling papers, a rolling machine, residue of marijuana and blunt cigars were found. The Court of Appeals concluded that it was reasonable to infer from the evidence presented that Zuniga knew that the residence in which she waited was used for the unlawful use of a controlled substance.

In a visiting a common nuisance case the State also has the burden of proving beyond a reasonable doubt that the place the defendant visited was used on more than one occasion for the unlawful use of a controlled substance. Specifically, the term "common nuisance" as used in the statute requires proof of continuous or recurrent violation, the Court said.

The Court of Appeals concluded that in Zuniga's case the State failed to prove that the residence in which the defendant was arrested had been used on more than one occasion for the unlawful use of a controlled substance. The State argued that the "on more than one occasion" requirement only applies to the crime of maintaining a common nuisance. The Court did not agree. The Court reiterated that "the legislature did not intend to strike the meaning of 'common nuisance' established by Indiana case law from subsection (a) of I.C. 35-48-4-13 because of the amendment of subsection (b)." "The 'on more than one occasion' requirement must still be proved beyond a reasonable doubt by the State to convict the defendant under 35-48-4-13" (visiting a common nuisance) the Court said.

Zuniga's conviction was reversed.

INDIANA SUPREME COURT HEARS ORAL ARGUMENT ON TONGUE STUD CASE

On September 16, 2004, the Indiana Supreme Court entertained oral argument in the Brenna Guy case. A review of the facts of that case reveal that Officer Corey Shaffer had reason to believe that Guy was impaired after he stopped her vehicle in Marion County in August, 2001. Guy's failure of three field sobriety tests prompted the officer to offer her a chemical breath test. Prior to administering the test, Officer Shaffer observed a tongue stud in Guy's mouth. Shaffer did not have Guy remove the stud. He did, however, wait the mandatory 20-minutes before administering the test. Guy tested .11. Following that test, Shaffer placed Guy under arrest. Guy moved to suppress her breath test results. The trial court denied that motion and Guy took an interlocutory appeal.

In its opinion of April 2, 2004, the Indiana Court of Appeals concluded that Guy had proven that the metal stud in her mouth was a "foreign substance". Because Guy had a foreign substance in her mouth during the 20 minute waiting period and during the administration of the test, the Court held that the breath test procedures mandated by the Indiana Administrative Code had not been followed. The Court of Appeals held that the trial court erred in denying Guy's motion to suppress. On July 8, 2004, the Supreme Court granted transfer thus vacating the Court of Appeals opinion in the *Guy* case.

Before the Supreme Court the State argued that the only reasonable interpretation of the breath test procedure regulation is that it requires that a person not "put" anything in the person's mouth during the 20 minute waiting period prior to administration of the test. Deputy Attorney General Cindy Ploughe argued to the Court that all the Court needed to do in this case was say that the regulation means what it says - a person is not to "put" any object into the mouth for 20-minutes prior to a breath test. And, if in fact, no foreign substance has been placed in the mouth during that period, the State has met its burden of proof with regard to proper testing procedure.

The defense argued that if the Court were to accept the State's interpretation of the regulation, a person to be tested could stuff his/her mouth with items such as gum, chewing tobacco, and/or "nuts and berries" 21 minutes prior to the breath test and that even these actions would not negate the test results. Defense attorney Bob Hammerle argued that interpretation of the regulation to allow for such actions would open the floodgates of litigation.

The State countered that once the State has met its burden of showing that the proper procedures have been followed in the administration of a breath test, the burden shifts to the defense to show the test result unreliable. It was the State's position that evidence of a scenario such as that suggested by the defense should go to the weight of the breath test result and not its admissibility.

Two times during the argument, Chief Justice Shepard mentioned the possibility of adopting new regulations so as to avoid this issue altogether. The case was taken under submission. The Court of Appeals opinion was vacated upon the acceptance of transfer by the Supreme Court. The Court's decision in this case may be the first appellate level "tongue stud" case in the nation.